

**AUSTRALIAN GOVERNMENT**

**Options Paper:  
A Modernisation and Harmonisation of the Regulatory Framework  
Applying to Insolvency Practitioners in Australia**

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**Comments by the  
Australian Manufacturing Workers' Union (AMWU)**

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## **1. Introduction**

The Australian Manufacturing Workers' Union (AMWU) thanks the Treasury for the opportunity to make submissions in response to the Options Paper on modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia.

The AMWU represents approximately 120,000 members working across major sectors of the Australian economy. AMWU members are primarily based in the manufacturing division in the sub-divisions of metal manufacturing, printing and graphic arts, food and vehicle building, repair and service. The AMWU also has significant membership in the mining, building and construction, aircraft and airline operations, laboratory, technical, supervisory and public sector employment. Our members work in unskilled, semi skilled, trade and professional occupations within these industries and source their workplace entitlements and responsibilities from a variety of industrial instruments including award, over award certified agreements and common law arrangements.

The options paper is in response to concerns held by industry participants and stakeholders about the level of professionalism and competency of insolvency practitioners, transparency and communication in the insolvency process and efficiency within the insolvency profession. The AMWU and its members, many of whom have personally suffered the aftermath of corporate insolvency, welcome the opportunity to participate in this reform process.

The AMWU notes that this paper provides options for reform of 10 key areas. This response will discuss these areas and options in turn, with reference to the proposed questions for discussion. While some areas may be more fully involved and argued than others, this should not be taken as indicative of the weight the AMWU gives any particular issue.

## **2. Standards for Entry into the Insolvency Profession**

The AMWU supports expanding the scope for entry into the insolvency profession, while maintaining stringent standards. In particular, the AMWU supports greater weight being placed on legal qualifications and industry experience, addressing the current imbalance toward accounting qualifications.

### *a. Option One: Maintain the current standards for entry*

The AMWU does not support this option. The current entry standards must be reformed in order to properly address community concerns about the professionalism and competency of insolvency practitioners in the Australian market.

### *b. Option Two: Expand the scope for insolvency entrants*

The AMWU supports the removal of the discrimination in favour of accounting at the expense of legal studies in the qualification of insolvency practitioners. Although the AMWU recognises that accounting expertise is vital to the competency of an insolvency practitioner, commercial legal experience also conveys appropriate skills.

The AMWU notes that the fiduciary duties imposed by a legal relationship and the additional scrutiny of the Law Society provide additional reasons that increasing the

weight put on legal qualifications would benefit the insolvency profession, acting as a further deterrent against unethical behaviour.

The AMWU strongly supports the proposal at [68] to require all potential new entrants to complete at least one year of insolvency specific courses. The AMWU recommends that weight be given to courses that teach practical skills and ethical behaviour.

*c. Option Three: Alignment of Standards for Entry*

While the AMWU in principle supports the alignment of standards generally between corporate and personal insolvency practitioners, the union believes that any alignment should not reduce the requirements imposed on corporate insolvency practitioners. In particular, the AMWU does not support the proposal to reduce the required period of experience from five years to two years.

If the required level of experience in corporate insolvency is reduced, the AMWU strongly recommends that ASIC be empowered to impose conditions on new entrants as it considers necessary, as outlined at [79]. In particular, the AMWU supports the imposition of minimum training and professional development requirements on new entrants into corporate insolvency.

### **3. Registration Process for Insolvency Practitioners**

Improving the transparency and efficiency of the registration process is key to addressing community and industry concerns about the integrity of the insolvency profession. In particular, the AMWU supports the introduction of fixed terms of registration of insolvency practitioners. The introduction of a re-registration process provides regulators with a greater opportunity for ongoing scrutiny of insolvency professionals, and ensures registered practitioners retain up-to-date qualifications and relevant experience.

*a. Option One: Enhance ASIC's and ITSA's current registration process*

While the AMWU supports the enhancement of the registration process, it is clear that Option Two provides greater levels of alignment between corporate and personal insolvency practitioners, and best addresses industry concerns about the competency and professionalism of insolvency practitioners.

*b. Option Two: Adoption of a committee structure in corporate insolvency*

In the registration of corporate insolvency practitioners, the emphasis must be on quality control. As such, the AMWU supports the adoption of a committee structure for the registration process of registered liquidators in corporate insolvency. This process would grant greater regulatory oversight over the registration of new entrants into the insolvency profession. In particular, the AMWU strongly supports an interview and examination process to determine that candidates have an appropriate level of expertise and fulfil the 'fit and proper person' criteria.

The AMWU also supports the imposition of fixed registration terms, with applicants for re-registration required to demonstrate continued good character and the maintenance of relevant skills and qualifications. While the process may be less

stringent than that applying to new applicants, it is important that candidates for re-registration are genuinely scrutinised.

#### **4. Remuneration Framework for Insolvency Practitioners**

Reform to the remuneration framework for insolvency practitioners is of particular significance to the AMWU, given that in many insolvency circumstances excessive remuneration or practitioner abuse of disbursements can be directly detrimental to the ability of employees to recover their entitlements, given that insolvency practitioners are paid first.

##### *a. Option One: Status quo with potential conflicts of interest addressed*

The AMWU does not believe the status quo provides adequate regulation of the remuneration framework for insolvency practitioners, and as such supports this option only as a bare minimum. The amendments to the Corporations Regulations proposed at [218] preventing a liquidator from using their casting vote to resolve a resolution of a creditor's meeting concerning their own is a key recommendation to address obvious conflicts of interest.

##### *b. Option Two: Address the issue of disbursements*

The AMWU supports proposals to restrict what can be charged as disbursements. Any prohibition on arrangements outside of remuneration benefiting practitioners should be extended to charging disbursements with a profit component that benefit the practitioner in any way, as suggested in [233].

##### *c. Option Three: aligned enhancements*

The AMWU believes that Option Three is the most appropriate way of addressing concerns over insolvency practitioner remuneration. In particular, the AMWU supports the incentivisation of challenges to liquidator remuneration by removing associated costs and granting increased priority to creditors who successfully challenge liquidator remuneration, provided that employee claimants are able to access this. The AMWU notes that this reform must go hand-in-hand with an increased role for employee representatives in the corporate insolvency process, as discussed further on.

#### **5. Communication and Monitoring**

The AMWU strongly supports regulatory change that increases the communication requirements imposed upon insolvency practitioners. In particular, the AMWU recommends that improvements be made to the level of communication between corporate insolvency practitioners and employees through the creation of a greater role for employee representatives in the committee process.

The AMWU notes the discussion questions at [308]-[310]. The AMWU strongly supports increasing the prominence of the creditors committee in corporate insolvency proceedings, as well as the proposal to allow creditors committees to make binding resolutions on liquidators. In order to make sure this process reflects the needs of employee creditors the AMWU believes it is necessary to provide a more formal role for unions in the committee structure, beyond that available to them as proxies. This reflects the unique position of employee creditors and the reality of the role played by unions in communicating events in the insolvency process to members.

*a. Option One: maintain the status quo*

The AMWU does not support this option.

*b. Option Two: align creditors powers to effectively monitor administrations*

As discussed above, the AMWU broadly supports the ideal of aligning the regulation of corporate and personal insolvency practitioners. In particular the AMWU supports the proposal at [297] to amend the Corporations Act to require a liquidator to provide information about the external administration of a company to a creditor who reasonably requests it. This will greatly strengthen the position of employee creditors and remove much of the uncertainty and distress that currently is a feature of many corporate insolvencies.

*c. Option Three: controlling the direction of a winding up*

The AMWU strongly supports this option. It is vital to the accountability and legitimacy of the insolvency process that creditors be granted greater influence in the direction of a winding up. However it is important that this control be able to be accessed fully by all creditors and with respect to the rights of employees. The proposal at [300] of a high threshold level of creditors to make a binding resolution of this kind is an appropriate solution, although it may be necessary to implement safeguards to ensure that this reform is not abused to the detriment of employees.

## **6. Funds Handling and Record Keeping**

The AMWU notes that poor record keeping and funds handling is symptomatic of the abuse of insolvency processes characterised by phoenix activity in the corporate sector. Strengthening regulation in this area is a substantial step toward fully addressing this kind of rogue corporate activity and is vital to addressing community concerns about the insolvency profession.

*a. Option One: Maintain the status quo with minor enhancements to funds handling*

The AMWU supports this option as an absolute minimum reform, but notes that it is not compatible with the stated goal of aligning regulation of personal and corporate insolvency practitioners. The AMWU supports the proposal to extend the funds handling rules in corporate insolvency to voluntary administration, as this has the potential to avoid abuse of insolvency practices.

*b. Option Two: Alignment with enhancements*

The AMWU strongly supports the principle of alignment of corporate and personal insolvency provided that the standards for corporate insolvency practitioners are not decreased, as discussed above.

Ensuring that proper books are kept in all circumstances is a key element in making sure that insolvency practices are not abused, as in phoenix activity. The AMWU strongly supports the proposal at [372] that the Corporations Act be amended to provide more prescriptive requirements in all cases of corporate insolvency, and encourages the Treasury to establish a common period for which records must be retained which at the least does not detract from the current standards imposed on corporate insolvency practitioners. In order to make this regulation as practical as possible, particularly for small business, the AMWU recommends that electronic

records be permitted in the place of paper records if and only if the electronic records are shown to be adequately stored and protected from degradation.

*c. Option Three: increase penalties*

The AMWU strongly supports increasing penalties for breaching funds handling, record keeping, retention of books and audit provisions for corporate and personal liquidators. In order to ensure that these penalties provide a suitably effective deterrent against abuse of insolvency practices, the AMWU believes it is necessary to impose criminal penalties for sufficiently serious breach.

The AMWU also supports the proposal at [381] to make minor breaches of the requirement to lodge accounts a grounds for removal. This proposal should be extended to allow the regulator to intervene to remove the practitioner, and in sufficiently serious circumstances should be grounds for deregistration. Only through strict regulation and enforcement can the regulator fully incentivise compliance.

**7. Insurance Requirements for Insolvency Practitioners**

Employee creditors are hardest hit by losses suffered due to the act or omission of an insolvency practitioner. The AMWU strongly supports the proposed reforms strengthening the insurance responsibilities of insolvency practitioners and regulator oversight of this issue.

*a. Option One: increasing severity of penalties for breach*

The AMWU supports this option. Increased penalties will serve as a significant deterrent. In particular, the AMWU supports the recommendation at [416] to make breach subject to both civil and criminal penalties.

*b. Option Two: required notification of lapsed insurance policies*

The AMWU supports the implementation of this proposed reform concurrently with the increased penalties canvassed in Option One. The AMWU notes the potential for increased cost burdens but believes this is balanced by the benefits provided by this option.

*c. Option Three: Establishment of a fidelity fund*

The AMWU broadly supports the Senate Committee's recommendation that the major accounting bodies establish a Fidelity Fund to ensure that creditors are insured for fraud and wrongdoing, although notes the high costs of this option and the limited deterrent effect. This option is less desirable than a concurrent implementation of option one and two.

*d. Option Four: Mandated periodic checking of insurance cover*

As discussed above, the AMWU supports the introduction of limited periods of registration for liquidators. As such, if this is implemented, it would be an appropriate and low-cost option to make re-registration contingent on evidence of appropriate insurance.

**8. Discipline and Deregistration of Insolvency Practitioners**

In order to address community and industry concerns about the quality and professionalism of insolvency practitioners, it is important that the process for

discipline and deregistration be enhanced. In particular reforms are necessary to ensure the process is efficient, transparent and

*a. Option One: enhanced status quo*

If the CALDB is retained as the structure responsible for determining disciplinary actions against registered liquidators, it is critical that amendments to that body's processes are implemented to increase speed and the transparency of decisions. To that end the AMWU supports the proposals at [481] to introduce legislative time limits and at [484] to improve public access to decisions and supporting materials. In particular, it is vital that the committee processes be amended to require decisions to be published except in very limited circumstances, as proposed at [487]. Further, the proposal at [489] imposing a penalty where witnesses fail to appear or documents are not produced is a key element in enhancing the stature of the CALDB in the profession.

*b. Option Two: alignment of disciplinary frameworks for practitioners*

As discussed, the AMWU supports alignment of legislative frameworks to the extent that standards for corporate insolvency professionals are not reduced. If a uniform committee is to be introduced, it must be required to publish its decisions and operate within strict time limits, for the transparency and accountability reasons discussed above. Further, any such committee must have the ability to impose penalties for non-compliance with its processes (as proposed at [499]). The AMWU also supports the proposal to expand the grounds upon which a practitioner may be deregistered.

*c. Option Three: Enhance the powers of the court*

The AMWU supports enhancing the powers of the court to deal with insolvency practitioners. In particular, the proposal to amend the law to allow the court to take public interest considerations into account (at [505]) would be a significant and positive step forward. Further, providing creditors standing to apply to the court to remove an insolvency practitioner due to concerns about propriety will address major concerns about the abuse of insolvency processes to avoid employee and other creditor entitlements.

## **9. Removal and Replacement of Insolvency Practitioners**

The AMWU is concerned with the current limitations on the ability to remove and replace insolvency practitioners, particularly in cases of misconduct or concerns about conflicts of interest. It is vital that creditor control over this element of insolvency processes be increased. However, as discussed above, in order to ensure equity it is important that the special status of employee creditors be represented in this process, potentially through an expanded role for employee representatives.

As part of this, it is clear that there is a need to facilitate the transfer of books and records of the administration from any outgoing insolvency professional to their replacement. The AMWU notes that unethical and non-transparent manipulation of records is a key feature of abuse of insolvency processes, and must be addressed both within the context of handing over between outgoing and incoming insolvency professionals, and more broadly.

*a. Option One: enhanced status quo*

The AMWU broadly supports the amendments to the Corporations Act proposed at [556]-[557] for the reasons discussed above. However, this option does not fulfil the stated goal of greater alignment between personal and corporate insolvency regulation.

*b. Option Two: alignment*

The AMWU supports the proposed amendment to the Corporations Act to provide creditors with the power to remove a liquidator by resolution, provided that the special status of employee creditors is recognised. The AMWU notes that this reform will act as an incentive for insolvency professionals to provide higher levels of communication and transparency, as well as encourage more competitive pricing and higher output levels.

**10. Regulator Powers**

Increasing the level of communication between insolvency practitioners and the regulator, including the provision of information to stakeholders, is an important step in addressing community concerns about the insolvency profession, as well as promoting efficient markets for insolvency services. The AMWU supports a stronger and more active role for the regulators.

*a. Option One: increase regulator powers in an aligned manner*

The AMWU supports the amendment of the Corporations Act and the Bankruptcy Act to increase surveillance powers, assist creditors and share information with interested parties. In particular, opening the channels of communication about external administrations, bankruptcies and insolvency practitioners (as flagged at [612]) would go some way to addressing the problem experienced by employee creditors and their representatives when 'left in the dark' about these processes.

Expanding the power of the regulator in these areas will also help combat dishonest or manipulative practices by insolvency practitioners, currently supported by their ability to delay creditors meetings and restrict information. The AMWU also supports expanding the role of the regulator to include the power to call and participate in creditor's meetings to ensure they are conducted in a fair and timely manner, which will also assist in businesses with limited insolvency expertise.

The AMWU supports granting the regulator discretion in how to exercise these powers, provided that public interest considerations are taken into account and that interested parties can make submissions and see reasons for decisions not to interfere. The AMWU also supports formal information sharing requirements between the personal and corporate insolvency regulators to increase accountability and transparency across the industry as a whole.

*b. Option Two: ombudsman*

The AMWU broadly supports the introduction of an Industry Ombudsman to handle disputes concerning insolvency practitioners. If this body were to be established, it should be a statutory body independent of the two regulators to ensure maximum transparency. It is also important that creditors and third-parties such as employee representatives have appropriate recourse to any such body. The AMWU supports an explicit educative role for any Ombudsman.



## **11. Specific Issues for Small Business**

Reform to issues directly affecting small businesses is vital to substantial reform of the insolvency profession, given the fact that an overwhelming majority of corporate insolvencies concern businesses with assets of \$100,000 or less. It is important to incentivise formal external administrations and make these practicable for small businesses as the failure to engage in these formal processes leaves employees unable to access the GEERS system and often without the ability to claim their entitlements.

The AMWU notes with approval the Government's commitment to addressing phoenix activity in small businesses, in particular in the area of protecting employee entitlements. Reform to insolvency practitioner regulation is an important step toward achieving this goal, as will be discussed below.

### *a. Option One: clarify regulatory obligations of ASIC and ITSA*

The AMWU supports the proposed legislative amendment allowing ASIC and ITSA to adopt a co-operative approach to investigations overlapping personal and corporate insolvency. This is a common-sense reform that increases accountability and transparency of insolvency processes, while also simplifying the process and providing greater certainty for small businesses where both processes may be occurring at once.

### *b. Option Two: expand the scope of the AA fund*

The AMWU supports the expansion of the AA fund to better facilitate the investigation of bankrupt directors. This reform will address community concerns about the integrity of the insolvency process, as well as provide a further deterrent to unethical or dishonest behaviour by company directors. The AMWU also supports the expansion of the fund to provide loans to ensure insolvency processes are correctly carried out, as this would encourage the use of formal external administrations and directly benefit employee creditors.

### *c. Option Three: Amend the corporations act to address phoenix activity*

The AMWU strongly supports these proposals. Phoenix activity is the greatest threat to the integrity of the insolvency profession, and regularly leaves employees with no means to access their entitlements. In particular, the AMWU supports the amendment of the Corporations Act to disqualify directors for failing to take reasonable steps to maintain records. However, the AMWU believes this should also expand to voluntary administrations. Poor record keeping is both symptomatic of and integral to phoenix activity, and failure to expand this reform to voluntary administration will undermine the Government's commitment to cracking down on this abuse of insolvency processes.